Supreme Court, U.S.
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No. 10-826

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

GUY PIERCE, Petitioner,

v.

HENRY GRIFFIN, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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STATUTES INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) reads, in relevant part.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Trial

In 1985, a jury found Respondent, Henry Griffin, a 37-year-old heroin and cocaine addict, guilty of murder for the contract killing of a drug dealer and gang member. The case proceeded to a capital sentencing hearing. Griffin waived the jury for both the eligibility and sentencing stages and the court found him death eligible. At the penalty phase, the State reoffered all the evidence heard during the trial and presented certified copies of Griffin's prior convictions: 1965 (attempted robbery), 1972 (robbery), 1972 (Federal mail and bank theft), 1978 (unlawful use of a weapon), 1982 (possession of a controlled substance), and 1982 (possession of a controlled substance).

In mitigation, defense counsel called two witnesses: Henry Griffin, and an acquaintance of Griffin's named Ida Powe – a witness with whom Griffin's counsel had never spoken "until a few minutes" before she testified. Griffin testified about his drug addictions and prior convictions and denied killing anyone. He also stated that when he was a teenager he had been placed in a mental institution for attempted suicide and depression and had escaped on two occasions. Griffin's testimony on direct examination spanned less than 4 pages of transcript. Powe testified that she had known Griffin since 1974 and had never known him to commit any type of violence against another person. She did not think he was capable of murder. Counsel presented 8 total pages of testimony from two convenient witnesses. No school, mental health, or institutional records were admitted into evidence, no family members testified, and no experts were called. In closing, counsel focused on the quality of the evidence of guilt and admitted that "until just minutes ago, I had never spoken to that lady [Ida Powe] in my life."

Prior to sentencing, the court ordered and received a presentence report from the

probation department.[1] The report included the following information: Griffin had been a truant who did not finish grammar school; he "had a normal childhood and good relationships with his parents and siblings;" he had a common law wife with whom he had two children; he had several prior convictions; he developed a drug addiction in his mid-to-late twenties; and while a teen he was in a mental hospital for depression. The sentencing range was between 20 years and a death sentence. Ill. Rev. Stat., ch. 38, ¶ 9-1(b)(5) (West 1984); Ill. Rev. Stat., ch. 1005, ¶ 1005-8-1 (a)(1) West 1984). Without specific findings, the court sentenced Griffin to death. Griffin appealed directly to the Illinois Supreme Court.

Review in State Court

On direct appeal, Griffin raised ineffective assistance of counsel claims relating to his counsel's performance at sentencing based on *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Griffin*, 592 N.E.2d 930, 934 (Ill. 1992) (*Griffin I*), *cert. denied*, 507 U.S. 924 (1993). The Illinois Supreme Court affirmed the conviction and death sentence stating that Griffin "failed to make the necessary *Strickland* showing."[2] *Id.* at 935.

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[1]In its Petition for Certiorari, Petitioner incorrectly states: "Counsel also submitted a presentence investigation report containing information on Griffin's personal and family background, including his relationships with his parents, siblings, wife and children." Petition at 4. The presentence investigation was ordered by the trial judge, not defense counsel, and prepared and submitted for the court's consideration by the probation department.

[2]Petitioner incorrectly states:"The Illinois Supreme Court rejected the claim because the [mental health] records were remote in time." Petition at 4. The only discussion of the records remoteness is in the concurring opinion not adopted by a majority of the Illinois Supreme Court. *Griffin I*, 592 N.E.2d at 937. More significantly, the mental health records to which the court refers were never entered into evidence at the sentencing hearing.

Griffin again advanced his *Strickland* claim in a state post-conviction petition.[3] The trial court dismissed the petition without an evidentiary hearing. The court orally ruled that defense counsel's performance had not been deficient and that the court

> was certain that this was one case, one of several or maybe five or six cases this Court had in its experience and as a trial court extending over 25 years, that death was absolutely required as punishment in this case because your client, Mr. Griffin, was the shooter here.
>
> He accepted money from Ashley here. He accepted that money for the purpose of executing the decedent here and this Court has no question in it's mind that the only punishment that would justify the deceased existence would be an eye for an eye and that is death....

Id. Griffin appealed.

On appeal, the Illinois Supreme Court affirmed. *People v. Griffin*, 687 N.E.2d 820 (Ill. 1997) (*Griffin II*), *cert. denied*, 524 U.S. 956 (1998). Despite trial counsel's affidavit stating his omissions were not strategic choices and despite the denial of an evidentiary hearing, the state supreme court determined that counsel's performance was not constitutionally deficient because his failure to present mitigating evidence was "clearly a strategic decision." *Id.* at 833. In terms of prejudice, the court focused on the aggravation presented, citing Griffin's unsigned statement and his "lengthy" criminal history. *Id.* at 834. As to the evidence uncovered at post-conviction, the court stated that the proffered mitigation "either is cumulative to the evidence already introduced at trial or is not inherently mitigating." *Id.* The court also noted that the post-conviction court was the sentencer and, "the [trial] court stated that the introduction

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[3]Petitioner describes what Griffin attached to his petition in support of his *Strickland* claim: "Griffin said that counsel failed to introduce his school, mental health and prison records, a psychological evaluation, and affidavits from five family members." Petition at 4. The petition was supported by affidavits of eleven relatives and friends; an affidavit of trial counsel in which he admitted that he failed to conduct a mitigation investigation; mental health, school, and prison records that counsel failed to obtain; and a report and affidavit of a clinical psychologist who examined Griffin and pertinent data.

of this proffered evidence would not have changed defendant's sentence." *Id.*

Federal Habeas Corpus Proceedings

Griffin sought habeas relief from the Northern District of Illinois raising the *Strickland* claim, *inter alia*. The district court ordered an evidentiary hearing on the claim limiting the hearing to the performance prong, and reviewing records and affidavits submitted at state post-conviction proceedings to assess prejudice. During the pendency of the proceedings, Griffin's death sentence was commuted to life imprisonment.

In an opinion and order dated July 29, 2009, the district court denied habeas relief. *Griffin v. Mathy*, No. 98 C 5024 (N. D. Ill., July 29, 2009) (Slip Op. 30). The court found counsel made no investigation for mitigating evidence as he neither interviewed any witnesses nor collected any records, and counsel did not have good reason for failing to conduct this investigation. *Id.* at 10-13. Contrary to the state court's opinion, the district court held that counsel's decision to present a residual doubt argument in lieu of conducting an investigation into his client's background did "not meet the objective standards of reasonableness in performing his duties to Petitioner." *Id.* at 13.

In terms of prejudice, the district court rejected the majority of the state court's prejudice analysis as it had the performance analysis. The court determined that the proffered mitigation "by and large... cannot be turned by the prosecution into aggravating circumstances" and further that the evidence was not cumulative in that "[it] was not presented to the sentencing judge either directly or through the presentence report." *Id.* at 15-16. However, the district court denied the claim based on what it termed a "state court finding of fact that the sentence would not have been different if the mitigation evidence proffered here by Petitioner had been offered and argued" and the "deference owed to" such a finding. *Id.* at 17-18. According to the

district court, this was "not an unreasonable determination of fact under the habeas statute." *Id.* at 18. Griffin appealed.

Court of Appeals

On appeal, the State conceded that trial counsel's failure to conduct any investigation into mitigation was unreasonable, and thus the court of appeals focused its attention on whether Griffin was prejudiced. *Griffin v. Pierce*, 622 F.3d 831, 843-44 (7th Cir. 2010). According to the court, Griffin "cleared the bar" of *Strickland*'s prejudice component because, had counsel performed effectively, "the sentencing court would have learned of the kind of troubled history [the Supreme Court has] declared relevant in assessing a defendant's moral culpability." *Id.* at 844 (citations omitted).

In addressing whether the state court's application of *Strickland*'s prejudice prong was unreasonable under AEDPA, the court of appeals addressed the reasons the Illinois Supreme Court relied on in denying Griffin's ineffectiveness at sentencing claim, *i.e.*, the trial judge's statement that the proffered evidence would not have changed Griffin's sentence, the weight of the aggravation, and the quality of proffered mitigation, which it determined was cumulative and/or not inherently mitigating.

The court of appeals stated that "the first problem" with the Illinois Supreme Court's prejudice determination was that it was "unclear to [the court of appeals] how much weight the state supreme court gave" the trial court's determination that the new evidence would not have changed the sentence. *Id.* at 845. The court of appeals noted that although it may give weight to such a statement, the statement is not conclusive, since "the question is not whether a particular judge would have imposed a different sentence, but rather whether there was a 'reasonable probability' that the sentence would have been different," *i.e.*, "an objective evaluation of the evidence." *Id.*

In addressing the other reasons, the court of appeals agreed with the district court that the proffered mitigation was neither "cumulative" nor "not inherently

mitigating" and "the court's determination to the contrary was unreasonable." *Id.* The court of appeals determined that although the Illinois Supreme Court gave consideration to the aggravation, "it did not properly evaluate the totality of the mitigation evidence and reweigh it against the aggravation evidence as it must." *Id.* Because Griffin had a "tragic personal history" in which his "childhood was anything but normal" and "horrendous," the court of appeals determined that there is a reasonable probability that the evidence would have made a difference in Griffin's sentence and that the Illinois Supreme Court's determination was an unreasonable application of *Strickland*. *Id.* at 845-46.

Thus, the court of appeals reversed the district court's judgment in part and remanded with instructions, granting Griffin's habeas petition on the *Strickland* claim only and allowing the State 120 days within which to resentence Griffin. *Id.* at 846.

REASON FOR DENYING THE PETITION

The Petition for Certoriari should be denied because Petitioner's alleged split in authority is nonexistent, none of the cases cited by Petitioner address the question presented, and all of the cases, including those where the judge both sentences the defendant and later rules on ineffective assistance of counsel claims, use the same standard to analyze *Strickland v. Washington* claims under AEDPA. 466 U.S. 668 (1984).

I.

NO CONFLICT EXISTS AMONG THE CIRCUITS REGARDING HOW AEDPA APPLIES IN CASES WHERE THE SAME JUDGE BOTH SENTENCES THE DEFENDANT AND LATER RULES ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner claims there is a conflict among the circuits in ineffective assistance of counsel claims concerning the level of deference required under AEDPA "for a state court *finding of fact* following a bench trial in which the trial judge determined that omitted evidence would not have a reasonable probability of changing the outcome." Petition at 8 (emphasis added).[4] Petitioner argues that the conflict exists "in ineffective

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[4]Petitioner's question presented and argument misstate the law. Under *Strickland*, the prejudice prong is not a "finding of fact" as stated by Petitioner, rather, it is a mixed question of law and fact.

> [I]n a federal *habeas* challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d)... it is a mixed question of law and fact... [and] both the performance and prejudice component of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (citations omitted).

assistance of counsel claims involving bench trials or bench sentencing hearings [because] the Seventh Circuit is according much less deference to state court findings of fact than the Second, Eleventh and Sixth Circuits." Petition at 13.

The Petition should be denied because there is no conflict between circuits since none of the cases cited by Petitioner actually addresses the level of deference required by AEDPA when the sentencing judge during post-conviction proceedings concludes that additional mitigation evidence would not have made a difference. Moreover, each case applies the well-established standards of *Strickland* and AEDPA. Finally, Petitioner claims *Porter v. McCollum*, 130 S. Ct. 447 (2009) – a case the circuit court and Respondent rely upon – is distinguishable from Griffin's case because it involved a jury sentencing. However, *Porter* involved a bench sentencing and it too applied the same, familiar standards under AEDPA. *Id.*

None of the cases cited by Petitioner addresses the question of the proper level of deference afforded under AEDPA when the trial or sentencing judge concludes that additional evidence would not have made a difference for purposes of establishing *Strickland* prejudice. In *Kokal v. Sec'y Dep't of Corr.*, there is no indication that the same judge presided over the sentencing and post-conviction proceedings. Consequently, there is no indication that the same judge concluded that the additional mitigation evidence would not have made a difference to his sentencing decision. Thus, the circuit court had no occasion to consider the level of deference owed to such statements. 623 F.3d 1331, 1347-50 (11th Cir. 2010). It appears that Petitioner relies on *Kokal* because the circuit court stated it was "obliged to afford AEDPA deference to the Florida Supreme Court's decision," a proposition Griffin does not contest and the standard the Seventh Circuit applied. *Id.* at 1346.

The same is true for *Phillips v. Bradshaw*. The case never even suggests that the trial judge stated that the proffered mitigation would not have changed petitioner's

sentence, and the circuit court does not rely on such a statement in its prejudice analysis. 607 F.3d 199 (6th Cir. 2010). Petitioner appears to rely on the case for the principle that under AEDPA where the state court decided the issue in a cursory fashion, the Sixth Circuit engages in a more thorough review. 607 F.3d at 299.

The only case Petitioner cites that actually mentions that the trial judge was unconvinced by evidence presented following trial is the *Dunham* case, where the Second Circuit noted that the same state judge "was unmoved by one of the allegedly inconsistent statements" in a post-trial ineffective assistance of counsel claim for failure to impeach a witness. 313 F.3d 724, 732 (2d Cir. 2002). In that case, however, the Second Circuit simply determined that "trial counsel's decision was strategic" and that the petitioner "suffered no prejudice" and thus, never discussed or applied the deference standards of AEDPA. *Id.* Thus, it provides no basis for Petitioner's assertion that it applied a level of deference different from that applied by the Seventh Circuit.

Not only do the cases upon which Petitioner rely fail to address the specific issue upon which Petitioner seeks certiorari, the circuit courts in these cases either afforded the well-established level of deference required under AEDPA – the same level the Seventh Circuit employed in this case – or in one instance did not even apply the AEDPA standards. *Kokal*, 623 F.3d at 1346-47 (acknowledging that "the idiosyncrasies of the particular decisionmaker... are irrelevant to the prejudice inquiry," and that under AEDPA, the court's "task, then, is to ask whether the Florida Supreme Court unreasonably weighed the aggravating evidence against the totality of the evidence in mitigation."); *Phillips*, 607 F.3d at 209 ("in judging the reasonableness of the adjudication, we look to *Wiggins* [ ] and *Rompilla* ... because they ... applied the clearly established precedent as *Strickland*." (citations omitted)); *Dunham*, 313 F.3d at 732 (circuit court did not apply AEDPA deference because ineffectiveness claim lacked merit); *similarly, Griffin*, 622 F.3d at 845 (acknowledging that "the question is not

whether a particular judge would have imposed a different sentence, but rather whether there was a 'reasonable probability' that the sentence would have been different," the Seventh Circuit court decided whether the "Illinois Supreme Court's determination that Griffin was not prejudiced by his counsel's deficient performance at sentencing was an unreasonable application of *Strickland*.")

Finally, Petitioner characterizes the *Kokal* and *Phillips* cases as bench sentencing cases even though juries recommended death because the trial courts under the law of each state – Florida and Ohio respectively – independently review the evidence and make findings regarding the aggravating and mitigating circumstances. Petitioner claims that cases such as these where the judge is the sentencer, including Griffin's case, are "distinct from cases involving sentencing *juries*" that the Seventh Circuit and Griffin relied upon. Petition at 9 (emphasis in original) citing, *inter alia*, *Porter*, 130 S. Ct. at 453.

Yet, Petitioner fails to distinguish the *Porter* case, since *Porter* also involved a sentencing judge, as it is a Florida case, and thus used the same sentencing procedure as in *Kokal*. 130 S. Ct. at 449. After hearing evidence in state post-conviction proceedings, the same trial judge during post-conviction proceedings held"that Porter had not been prejudiced by the failure to introduce any" of the mitigation that was presented. *Id.* at 449-451. After the circuit court denied relief, this Court granted habeas relief determining that the Florida Supreme Court unreasonably applied *Strickland* under 28 U.S.C. § 2254(d)(1) when it held that Porter was not prejudiced by his counsel's deficient performance. *Id.* at 444. The AEDPA standard in *Porter* is no different than the standard applied in Griffin or the Supreme Court cases the circuit court cited. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000). Essentially, Petitioner is asking this Court to create a new rule of law without providing a single reason for doing so.

The Seventh Circuit's opinion fits neatly within prior Supreme Court precedent. The court of appeals applied the *Strickland* prejudice standard when it determined that the case "falls in line with those cases in which the Supreme Court has concluded that counsel's failure to investigate and present proffered mitigation evidence prejudiced petitioner." *Griffin*, 622 F.3d at 844, citing, *Rompilla*, 545 U.S. at 390-93; *Wiggins*, 539 U.S. at 535; and *Williams*, 529 U.S. at 395-96. The court objectively evaluated the evidence to determine whether there was a reasonable probability that the sentence would have been different. *Id.* at 845; *see Strickland*, 466 U.S. at 695 ("[the assessment of prejudice] should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.) Applying AEDPA, the circuit court agreed with the district court that the state court's determination that the proffered mitigation was either cumulative or not inherently mitigating was unreasonable. The circuit court concluded that the state court "did not properly evaluate the totality of the mitigation evidence and reweigh it against the aggravation evidence as it must." *Id.*, citing *Porter*, 130 S. Ct. at 453-54. Thus, under AEDPA, the circuit court ruled that the Illinois Supreme Court's determination that Griffin was not prejudiced by his counsel's performance at sentencing was an unreasonable application of *Strickland*. *Id.* at 846.

Because there is no conflict among the circuits, the Petition for Certirorari should be denied.

CONCLUSION

For the foregoing reasons, Respondent, Henry Griffin, respectfully prays that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE
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GUY PIERCE, Petitioner,

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HENRY GRIFFIN, Respondent.

NOTICE AND CERTIFICATE OF SERVICE

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Please take notice that I have mailed the original and ten copies of the Motion to Proceed *In Forma Pauperis* and the Brief in Opposition in the above-captioned matter to the Clerk of the Court, and that I am serving the Attorney General of Illinois and State's Attorney of Cook County each with three copies, and the Petitioner with one copy by depositing the copies in the mail in Chicago, Illinois, with sufficient prepaid postage and addressed as indicated above on this 21st day of January, 2011. All parties required to be served have been served.

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